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Court of Appeals
Division III
State of Washington

34459-2-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DAVID BULLARD MIDDLETON, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENT OF ERROR

Mr. Middleton did not receive the effective assistance of counsel because counsel failed to move to dismiss the State's amended charges pursuant to CrR 4.3.1(b)(3).

II. ISSUES PRESENTED

1. Has the defendant established that his attorney did not object to the filing of an amended information after the court declared a mistrial when a jury was unable to reach a verdict on count 1 at the defendant's first trial?

2. Assuming defense counsel did not object to the filing of an amended information, was counsel deficient for failing to do so where possession of a stolen motor vehicle is a lesser included offense of first degree taking a motor vehicle without permission and, in any event, the decision to allow the amendment was tactical?

III. STATEMENT OF THE CASE

The defendant, David Middleton, was charged in the Spokane County Superior Court on June 16, 2015 with first degree taking a motor vehicle without permission (hereinafter "TMVWOP") and possession of a controlled substance. CP 3.

At trial, it was established that the defendant was driving a motor vehicle that had been reported stolen. 1/4/16 - 1/7/16 RP 5-6, 70-71. The

vehicle had been spray painted, and the license plate removed. 1/4/16 - 1/7/16 RP 9-10. Photographs taken by law enforcement of dark markings on the defendant's skin were consistent with spray paint. 1/4/16 - 1/7/16 RP 11-13. A metal file was located inside of the stolen vehicle; such files may be used to shave keys used in vehicle theft. 1/4/16 - 1/7/16 RP 10-11, 35. When law enforcement stopped the defendant, the key to the car was on a lanyard that contained multiple shaved keys. 1/4/16 - 1/7/16 RP 32-34. The particular key that was used to start the stolen car was not intended for use in that car, and was broken off in the ignition. 1/4/16 - 1/7/16 RP 33.

During a search of the defendant incident to arrest, law enforcement located methamphetamine, a controlled substance, on the defendant. 1/4/16 - 1/7/16 RP 24, 77. Upon his arrest, he told law enforcement he was given the wrong key to the vehicle by an acquaintance and that "he noticed the vehicle appeared to be spray painted so he figured there was something wrong with the car." 1/4/16 - 1/7/16 RP 29. When asked to clarify, he said that "something's wrong with the car" meant that "the vehicle was stolen." 1/4/16 - 1/7/16 RP 29. He stated that he "hoped and prayed that [his friend] would not do that to him ... would not let him get into a stolen vehicle." 1/4/16 - 1/7/16 RP 30.

Mr. Middleton testified on his own behalf. He admitted possessing the methamphetamine, but he denied having spray painted the car, denied

knowing it was stolen, and testified that the dark areas on his skin (believed to be spray paint) were his natural skin pigmentation.¹ 1/4/16 - 1/7/16 RP 135-146, 150. The defendant was convicted of only count 2, possession of a controlled substance; the jury was unable to unanimously decide count 1. The court declared a mistrial on count 1.

The State subsequently moved to amend the information on February 3, 2016. CP 104-110. After hearing from both the deputy prosecutor and Mr. Middleton's attorney, the Court granted the State's motion to amend the information on February 11, 2016. CP 114, 118. The amended information charged count 1 and 2 as originally included in the information, but added count 3, possession of a stolen motor vehicle, and count 4, third degree driving with license suspended. CP 115-116.

The defendant was sentenced on count 2, possession of a controlled substance, on February 17, 2016. CP 120-135. The court sentenced the

¹ During trial, Mr. Middleton testified:

I'm gonna own up to something that I did, I'm gonna be man enough to do that. I'm not going to pass the blame to nobody else. Everything that I did, I own up to. As for the controlled substances, Your Honor, guilty as charged. I'm guilty of that, I will own up to that. But what I won't own up to is something that I did not do. And I didn't paint this car nor did I steal it.

1/4/16 - 1/7/16 RP 150.

defendant to a standard range sentence of 18 months based on his offender score of “9+” prior felony convictions. CP 120-135.

The remaining three counts (counts 1, 3 and 4) proceeded to a jury trial. Substantially the same facts were elicited during the defendant’s second trial. 02/29/16 - 03/05/16 RP at *passim*. The jury found the defendant not guilty of first degree TMVWOP, but found him guilty of possession of a stolen motor vehicle and third degree driving while license suspended. CP 220-222.

The court sentenced the defendant on the remaining counts 3 and 4 on May 5, 2016. The defendant received 90 days on count 4, third degree driving with license suspended, to run concurrently with a 50 month sentence on count 3, possession of a stolen motor vehicle. CP 266, 278. However, the court ordered an exceptional sentence on count 3, ordering it to run consecutively with the sentence previously imposed on count 2. CP 265. In support of the exceptional sentence, the court found that the defendant’s high offender score would result in count 2, possession of a controlled substance, going unpunished without the imposition of an exceptional sentence. CP 283.

This timely appeal followed.

IV. ARGUMENT

A. DEFENDANT HAS NOT DEMONSTRATED THAT DEFENSE COUNSEL DID NOT OBJECT TO THE FILING OF AN AMENDED INFORMATION AFTER A MISTRIAL WAS DECLARED AT THE DEFENDANT’S FIRST TRIAL.

It is an appellant’s burden to perfect the record for review. RAP 9.2; *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999) (“The party seeking review bears the burden of perfecting the record so that we have before us all evidence relevant to the claimed error”). “Even though the entire record is not required, ‘those portions of the verbatim report of proceedings necessary to present the issues raised on review’ must be provided to the court.” *Dash Point Vill. Assocs. v. Exxon Corp.*, 86 Wn. App. 596, 612, 937 P.2d 1148 (1997). The court may decline to reach an issue where this burden is not met. *State v. Wheaton*, 121 Wn.2d 347, 365, 850 P.2d 507 (1993).

In this case, the defendant has failed to request a verbatim transcript of the motion hearing at which time the State moved to amend the information. The motion to amend was heard by the trial court on February 11, 2016. CP 118. That hearing has not been transcribed, despite the defendant’s three statements of arrangements filed in the present case.²

² The defendant filed his original statement of arrangements on July 6, 2016, and subsequently filed amended statements of arrangements on October 11, 2016 and November 11, 2016.

In each of those statements of arrangements, the defendant has requested a transcription of the original and second trial, and a transcription of the first and second sentencing hearing. However, at no time has the defendant requested a transcription of the motion hearing at which time the court granted the State's motion to amend the information, and during which time defense counsel could have made any proper objections to the filing of an amended information.

The courtroom minutes of the motion hearing are of no assistance to the defendant's claim on appeal, or to this Court's determination of the effectiveness of trial counsel. The minutes indicate that "respective counsels present the matter to the Court." CP 118. This could suggest that defense counsel *did* object to the filing of the amended information. It could also suggest that defense counsel *agreed* to the filing of the amended information. Therefore, the transcript of the motion hearing is necessary to establish what arguments were (or were not) made by defense counsel.

Defendant's *only* argument on appeal is that counsel was deficient for failing to object to the filing of an amended information. Yet, he has failed to procure a transcript of the motion hearing at which time defense counsel may (or may not) have objected, despite his multiple statements of arrangements. This failure is not a mere oversight, given that this particular

record is vital to the only issue on appeal and the defendant has designated or amended his designated portions of the record three times.

The fact that no written defense response to the motion to amend is contained within the clerk's papers is insufficient for this court to assume that no oral motion was made at the motion hearing. The court should decline to make any such assumption (especially because trial counsel is entitled to a strong presumption of effectiveness, as discussed below). The record before this Court is insufficient to establish whether defense counsel objected, or failed to object pursuant to the mandatory joinder rule, or explicitly presented a strategic reason for not objecting to the amendment; it is insufficient to establish whether the State was given the opportunity to respond; and, it is insufficient to determine whether the trial court ruled on the mandatory joinder issue. Because the defendant has failed to meet his burden under RAP 9.2, this court should decline to review this assignment of error.

B. STANDARD OF REVIEW FOR INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.

Review of an ineffective assistance of counsel claim begins with a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689, 80 L.Ed.2d 674, 104 S.Ct 2052 (1984). "To prevail on this claim, the

defendant must show his attorneys were ‘not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment’ and their errors were ‘so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.’” *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998), citing *Strickland*, 466 U.S. at 687. Judicial scrutiny of counsel’s performance is highly deferential and requires that every effort be made to eliminate the “distorting effects of hindsight” and to evaluate the conduct from “counsel’s perspective at the time”; in order to be successful on a claim of ineffective assistance of counsel, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689.

In order to rebut the presumption of effective assistance of counsel, the defendant must establish the absence of any “conceivable legitimate tactic explaining counsel’s performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (emphasis added).

The first element of ineffectiveness is met by showing counsel’s conduct fell below an objective standard of reasonableness. The second element is met by showing that, but for counsel’s unprofessional errors, there is a reasonable probability the outcome of the proceeding would have been different. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992).

C. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE AMENDMENT OF THE INFORMATION; LESSER INCLUDED OFFENSES ARE EXEMPTED FROM CrR 4.3.1, AND, IN ANY EVENT, TRIAL COUNSEL ACTIONS WERE STRATEGIC AS AN EFFORT TO SAVE MR. MIDDLETON A SIGNIFICANT AMOUNT OF PRISON TIME.

CrR 4.3.1(b)(3) states in part:

A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense.... The motion to dismiss must be made prior to the second trial, and shall be granted unless the court determines that because the prosecuting attorney was unaware of the facts constituting the related offense, or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

The mandatory joinder rule is intended as a limit on the prosecutor, and its purposes are to protect criminal defendants from: (1) successive prosecutions that can act as a hedge against the risk of an unsympathetic jury at the first trial; (2) a hold on the defendant after the defendant has been sentenced; or (3) harassment of the defendant through multiple trials. *State v. Gamble*, 168 Wn.2d 161, 225 P.3d 973 (2010). The mandatory joinder rule is procedural; it does not implicate double jeopardy. *State v. Dallas*, 126 Wn.2d 324, 330-31, 892 P.2d 1082 (1995).

The mandatory joinder rule prohibits the filing of new charges based upon alternative means of committing the originally charged offense because both crimes could have been charged in the original information.

State v. Anderson, 96 Wn.2d 739, 741, 638 P.2d 1205 (1982). It also prohibits the filing of other related charges, i.e., charges that are based on the same conduct and were with the jurisdiction and venue of the same court. *Dallas*, 126 Wn.2d at 329. However, the mandatory joinder rule does not prohibit the filing of lesser included offenses in an amended information, because lesser included offenses do not need to be charged at all. *Id.*; RCW 10.61.006.³

1. Possession of a stolen motor vehicle is a lesser included offense of first degree TMVWOP.

Defendant contends that it is “well-established that the crimes of Theft and Possession of Stolen Property are related offenses for purposes of CrR 4.3.1,” citing *Dallas*. However, the crimes at issue in this case are not theft and possession of stolen property. The crimes at issue are first degree taking a motor vehicle without permission and possession of stolen motor vehicle.

Additionally, in *Dallas*, the case cited by the defendant for the proposition that it has been determined that the charges at issue are not lesser included offenses, the parties *agreed* that neither theft nor possession of stolen property charges were lesser included offenses of the other. *Dallas*,

³ RCW 10.61.006 provides: In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he or she is charged in the indictment or information.

126 Wn.2d at 329-330. The court's holding in *Dallas* did not analyze whether the charged offenses were actually lesser included offenses.

Contrary to the defendant's assertions, the offense of possession of a stolen motor vehicle *is* a lesser included offense of first degree TMVWOP. To establish that an offense is a lesser included offense, it is necessary to show that: (1) each of the elements of the lesser offense is a necessary element of the offense charged (the legal test); and (2) the evidence supports an inference that the lesser crime was committed (the factual test). *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). If it is possible to commit the greater offense without committing the lesser offense, the latter is not a lesser included crime. *State v. Harris*, 121 Wn.2d 317, 849 P.2d 1216 (1993).

The elements of first degree TMVWOP are (1) intentionally taking or driving away without the permission of the owner or person entitled to possession (2) a motor vehicle that was the property of another and (3) altering the vehicle for the purpose of changing its appearance or primary identification.⁴ RCW 9A.56.070; CP 207.

⁴ Other means of committing first degree TMVWOP are possible, but are not at issue here. RCW 9A.56.070(1)(b)-(c).

The elements of possession of a stolen motor vehicle are (1) knowingly possessing a stolen motor vehicle (2) with knowledge that it was stolen and (3) withholding or appropriating the motor vehicle to the use of someone other than the true owner or person entitled to the vehicle. RCW 9A.56.068;⁵ CP 210. Possessing a stolen motor vehicle means to knowingly “receive, retain, *possess, conceal*, or dispose of a stolen motor vehicle knowing that it has been stolen.” RCW 9A.56.140; CP 209 (emphasis added).⁶

When the two offenses are compared, the elements of possession of a stolen motor vehicle fit squarely within the elements of first degree TMVWOP. Here, the greater offense, first degree TMVWOP requires the intentional taking of a vehicle. The lesser offense, possession of a stolen

⁵ The possession of a stolen motor vehicle statute became effective in 2007. RCW 9A.56.068.

⁶ Stolen means obtained by theft. RCW 9A.56.010(17); CP 212. Theft requires the wrongful obtaining or exertion of unauthorized control over the property of another with intent to deprive that person of the property. RCW 9A.56.020(1)(a). However, one does not have to intend to permanently deprive in order to commit the offense of theft. *State v. Crittenden*, 146 Wn. App. 361, 189 P.3d 849 (2008). Wrongfully obtains or exerts unauthorized control means to either take the property of another or to possess property and withhold, control, *secrete* or appropriate it to the use of any person other than the true owner (including the possessor’s own use). RCW 9A.56.010(22)(1)-(2); CP 214 (emphasis added).

motor vehicle, requires knowledge of possession. Proof of intent satisfies a statutory element requiring proof of knowledge. RCW 9A.08.010(2).

Each offense requires the possession of a motor vehicle. Each offense requires that the motor vehicle belongs to another person, and was taken from that person without their permission. Each requires that the true owner is deprived of the use of the vehicle, even if temporarily.⁷

The only element that differs in any meaningful way between first degree TMVWOP and possession of a stolen motor vehicle is that in order to commit the crime of first degree TMVWOP, a defendant must, in some fashion, alter the appearance of the vehicle. RCW 9A.56.070. Therefore, one cannot commit the offense of first degree TMVWOP without necessarily committing possession of a stolen motor vehicle.

This analysis must lead to a different conclusion than that reached in *Dallas, supra*, in which the court concluded that possession of stolen

⁷ First degree TMVWOP requires the alteration of the vehicle for purposes of changing its appearance. RCW 9A.56.070. One would not change the appearance of a motor vehicle if one did not intend to deprive the true owner of the property, even temporarily.

An actual deprivation to the use of someone other than the true owner is likewise required for possession of stolen property. RCW 9A.56.068.

property is not a lesser included offense of theft.⁸ A person does not have to be the *initial* “taker or driver” of a motor vehicle in order to commit the offense of first degree TMVWOP. *State v. Gonzales*, 133 Wn. App. 236, 148 P.3d 1046 (2006). In *Gonzales*, Division I concluded that the splitting of the former TMVWOP statute into two degrees did not create a distinction between initial and subsequent drivers or takers, but did create a distinction between those who take or drive away and those persons who “ride” in such a vehicle. *Id.* Therefore, the clear distinction between first degree TMVWOP and theft of a motor vehicle (or theft in general) is that, in order to be convicted of theft of a motor vehicle, the defendant must be the initial taker,⁹ whereas, to be convicted of first degree TMVWOP, the person merely must intentionally “take or drive away” the vehicle, without the permission of the owner, but need not be the initial thief.

⁸ We assume for purposes of this appeal that neither is a lesser included of the other because the parties are in agreement. Cases under the pre-1975 larceny statute hold that one cannot be both the principle thief and the receiver of stolen goods.

Dallas, 126 Wn.2d at 329 n.2.

⁹ Either by wrongfully obtaining or exerting unauthorized control over the property (asportation), by color or aid of deception obtaining control of the property with intent to deprive (embezzlement) or to appropriate lost or misdelivered property with intent to deprive (misappropriation). *See* RCW 9A.56.020; RCW 9A.56.065.

The legal prong of the *Workman* test having been met, the next inquiry is whether there is an inference that the lesser offense was committed. Mr. Middleton adamantly denied having spray painted or stealing the vehicle. However, he did not deny, and his own admissions to law enforcement indicate, that he drove in the vehicle knowing it was stolen, which satisfies the essential elements of possession of a stolen motor vehicle. Therefore, the factual prong of *Workman* is also met in this case.

Because possession of a stolen motor vehicle is a lesser included offense of first degree TMVWOP, it was not a violation of the mandatory joinder rule for the court to allow the State to amend the information to include the lesser offense. While it did not need to be included in the amended information, joinder of the offenses was not improper under CrR 4.3.1 and defense counsel's performance was not deficient if she failed to object to the amendment of the information and the joinder of the offenses.

2. The prosecuting attorney was unaware of the facts constituting the related offense, and thus, amendment was not improper.

CrR 4.3.1 provides that the motion to dismiss shall be granted unless the trial court determines that the prosecuting attorney was unaware of the facts constituting the related offense.

In this case, the State amended the information only after Mr. Middleton testified on his own behalf during the first trial. Mr. Middleton's testimony that the darkened areas of his skin were natural pigmentation, and were not black spray paint as alleged by the State, was information that was *solely* within the defendant's knowledge. It was likely based on that testimony that the defendant's first trial resulted in a hung jury and a mistrial on the first degree TMVWOP charge. Until the defendant testified at his first trial, the State would have no reason to believe that any crime other than first degree TMVWOP had been committed. Once the State learned that credible evidence existed that the "spray painted" areas of the defendant's skin were potentially natural pigmentation, it would be reasonable to amend the information to conform with that testimony. Therefore, the amendment was not improper. Defense counsel was not ineffective for not objecting to the amendment because amendment of the information was permissible.

3. It was not ineffective assistance for defense counsel to allow the amendment of the information because such decision may be characterized as a legitimate strategy to save her client additional prison time.

Even assuming defense counsel agreed to the amendment of the information, notwithstanding the provisions of CrR 4.3.1, the decision to do so was one of pure strategy, aimed at saving Mr. Todd a significant amount

of prison time. In his ineffective assistance of counsel claim, the defendant must overcome the presumption that, under the circumstances, the counsel's conduct may be considered sound trial strategy. *Strickland*, 466 U.S. at 689. To do so, the defendant must establish the absence of any "conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

Defense counsel tried the defendant's case to a jury two times. She was Mr. Todd's counsel when the first jury was unable to unanimously decide his guilt on the charge of first degree TMVWOP. During the first trial, the defense argued that no evidence had been presented that "Mr. Middleton intentionally took a stolen vehicle. There's no proof that Mr. Middleton took the license plate off that vehicle. There's no proof that Mr. Middleton spray painted that vehicle." 1/4/16 - 1/7/16 RP 229. She made this argument notwithstanding the defendant's admission at the time of his arrest that "he noticed the vehicle appeared to have been spray painted so he figured there was something wrong with the car" which meant "the vehicle was stolen." 1/4/16 - 1/7/16 RP 29.

When the first jury was hopelessly deadlocked¹⁰ on the charge of first degree TMVWOP, meaning that *at least* one member of the first jury was convinced of Mr. Middleton's guilt, or, potentially *all but one* juror was convinced of the defendant's guilt, it was entirely reasonable for defense counsel's strategy to change at the subsequent trial. It is also possible, if not probable, that defense counsel spoke with members of the first jury,¹¹ was aware of their thoughts and struggles in reaching a verdict, and why the jury was divided in its ability to reach a verdict. Based on this knowledge, it would not be unreasonable for defense counsel to change his or her approach to a second trial after a mistrial in an effort to effectively assist his or her client; failure to change strategy, might, in and of itself, be ineffective assistance of counsel.

¹⁰ The jury was deadlocked after deliberating from 10:30 in the morning on January 6, 2016 to the end of the day and until 3:00 in the afternoon on January 7, 2016. 1/4/16 – 1/7/16 RP 240-241.

¹¹ The Court: [I]n a moment I am going to release you, ladies and gentlemen. And if you want to stay in the jury deliberation room for a few minutes, I usually can come back and try to answer jury questions, if I can. I do that without the presence of counsel. But the lawyers may be out in the hall. They're always interested to talk to you, and I really encourage you to talk to lawyers if you have the time. I think they appreciate the feedback that you give them about the case as well...

1/4/16 – 1/7/16 RP 242-243.

After a mistrial where defense counsel has gained insight into the number of jurors who would have found guilt versus those who would have acquitted, it would be entirely reasonable for defense counsel to not oppose an amended information where counsel deems it more advisable to give the second jury the option to decide the defendant's guilt on one of two similar charges. This is especially true in this case, where the defendant admitted knowing the vehicle was stolen at the time of his arrest, but denied stealing it or changing its appearance. It is also especially true where, as here, the crime of first degree TMVWOP had a standard range sentence of 72 to 96 months for an individual with an offender score "9," whereas the standard range for possession of a stolen motor vehicle for a person with an offender score of "9" is 43 to 57 months. RCW 9.94A.510 - .515. Mr. Todd's offender score of "9" led the trial court to impose an exceptional sentence by running the sentences imposed on count 2 and count 3 consecutive to each other. Had the defendant been convicted of the first degree TMVWOP, not only would his potential exposure for incarceration pursuant to a standard range sentence be 29 to 39 months longer than if he were convicted of possession of a stolen motor vehicle, but he also would have faced the potential for an even lengthier exceptional sentence.

There is no evidence, whatsoever, that defense counsel did not consider this advantage prior to the amendment of the information and the

second trial, did not consult with her client, and did not, in her best judgment, proceed in the manner most likely to mitigate the defendant's potential exposure to incarceration. On appeal, it is the defendant's burden to demonstrate that there is no conceivably legitimate strategy that would explain defense counsel's performance. He has failed to do so, and therefore, his ineffective assistance of counsel claim fails.

4. Third degree driving while license suspended.

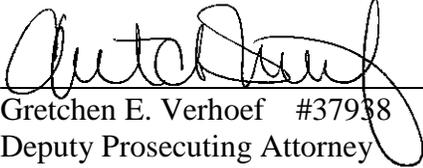
The State concedes that the crime of third degree driving while license suspended is a related offense for purposes of the mandatory joinder rule. It is clear that the State was aware of the facts upon which that charge was predicated, as the defendant was stopped driving the stolen motor vehicle and the officer determined at the time of the stop that the defendant's privilege to drive was suspended. CP 6. The State agrees that TMVWOP (as alleged in this case - that the defendant was driving the vehicle) and the crime of driving while license suspended, are based on the same conduct and were with the jurisdiction and venue of the same court. *Dallas*, 126 Wn.2d at 329. Therefore, the State must concede that it was error for defense counsel to not object (if she did not do so) to the amendment of the information to add this charge prior to the defendant's second trial. The State is unable to ascertain any strategic reason that counsel would not have objected to the inclusion of this charge in the amended information.

V. CONCLUSION

The State respectfully requests that this Court affirm the lower court and jury verdicts. The defendant has failed to produce any evidence in the record demonstrating that defense counsel failed to object to the amendment of the information after the court declared a mistrial. Furthermore, because possession of a stolen motor vehicle is a lesser included offense of first degree taking a motor vehicle without permission, joinder of the offenses was not improper pursuant to CrR 4.3.1. In any event, defense counsel strategically would have wanted to present the jury with a lesser, alternative crime to first degree taking a motor vehicle without permission so as to save her client significant incarceration, and the potential for a lengthier exceptional sentence.

Dated this 21 day of February, 2017.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

DAVID B. MIDDLETON,

Appellant,

NO. 34459-2-III

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on February 21, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

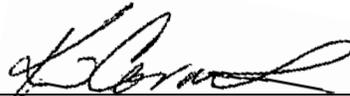
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2/21/2017

(Date)

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SPOKANE COUNTY PROSECUTOR

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